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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

KORY T. O'BRIEN,)	Case No.: 1:21-cv-00856-SAB (PC)
)	
Plaintiff,)	
)	
v.)	ORDER TO SHOW CAUSE WHY ACTION
)	SHOULD NOT BE DISMISSED, WITHOUT
RITA DIAZ, et al.,)	PREJUDICE, FOR FAILURE TO EXHAUST THE
)	ADMINISTRATIVE REMEDIES
)	
Defendants.)	(ECF No. 1)
)	
)	
)	

Plaintiff Kory T. O'Brien is proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983.

Currently before the Court is Plaintiff's complaint, filed May 27, 2021. Plaintiff contends he was subjected to retaliation in violation of his rights under the First Amendment.

**I.
SCREENING REQUIREMENT**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that "fail[] to state a claim on which relief may be granted," or that "seek[] monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B); see also 28

1 U.S.C. § 1915A(b).

2 A complaint must contain “a short and plain statement of the claim showing that the pleader is
3 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
4 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do
5 not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550
6 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate that each defendant personally participated
7 in the deprivation of Plaintiff’s rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

8 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings liberally
9 construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th
10 Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be facially plausible, which
11 requires sufficient factual detail to allow the Court to reasonably infer that each named defendant is
12 liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962,
13 969 (9th Cir. 2009). The “sheer possibility that a defendant has acted unlawfully” is not sufficient, and
14 “facts that are ‘merely consistent with’ a defendant’s liability” falls short of satisfying the plausibility
15 standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

16 II.

17 EXHAUSTION OF ADMINISTRATIVE REMEDIES

18 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with respect
19 to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any
20 jail, prison, or other correctional facility until such administrative remedies as are available are
21 exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available administrative
22 remedies prior to filing suit. Jones v. Bock, 549 U.S. 199, 211 (2007); McKinney v. Carey, 311 F.3d
23 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required regardless of the relief sought by the prisoner
24 and regardless of the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and the
25 exhaustion requirement applies to all suits relating to prison life, Porter v. Nussle, 435 U.S. 516, 532
26 (2002).

27 Prisoners are required to exhaust before bringing suit. Booth, 532 U.S. at 741. From the face of
28 Plaintiff’s Complaint, it is clear that Plaintiff filed suit prematurely and in such instances, the case may

be dismissed. Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc) (where failure to exhaust is clear from face of complaint, case is subject to dismissal for failure to state a claim under Rule 12(b)(6)); Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (“A prisoner’s concession to nonexhaustion is a valid ground for dismissal....”) (overruled on other grounds by Albino, 747 F.3d at 1168-69); see also Nordstrom v. Ryan, 762 F.3d 903, 908 (9th Cir. 2014) (“Dismissal for failure to state a claim under § 1915A ‘incorporates the familiar standard applied in the context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).’ ”) (quoting Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012)).

It is clear from the face of Plaintiff's complaint that he has not exhausted administrative remedies pursuant to the Prison Litigation Reform Act, 41 U.S.C. § 1997 (e)(a), before filing this lawsuit. Plaintiff states that he submitted his appeal to the third level on February 8, 2021, and he has not received a response. (Compl. at 8.) Plaintiff also states that he mailed a GA-22 inmate request for interview on February 9, 2021. (Id.) It is clear that Plaintiff appeal was still pending review at the third level at the time that Plaintiff filed the complaint in this action on May 27, 2021. Thus, it appears on the face of the complaint that Plaintiff failed to exhaust his administrative remedies before filing suit. Accordingly, Plaintiff shall be required to show cause why this case should not be dismissed, without prejudice, for failure to exhaust remedies prior to filing suit.

III.

ORDER

Based on the foregoing, it is **HEREBY ORDERED** that:

1. Plaintiff shall show cause in writing within **twenty-one (21)** days of the date of service of this order as to why this case should not be dismissed for Plaintiff's failure to exhaust administrative remedies before filing suit; and

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2. The failure to respond to this order will result in a recommendation to a district judge to dismiss this action without prejudice.

IT IS SO ORDERED.

Dated: July 1, 2021



UNITED STATES MAGISTRATE JUDGE